BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41S 30126464 BY THE TOWN OF STANFORD	)))	**PRELIMINARY DETERMINATION TO GRANT PERMIT**

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On August 20, 2019, the Town of Stanford (Applicant) submitted Application for Beneficial Water Use Permit No. 41S 30126464 to the Lewistown Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 500 gallons per minute (GPM), or 1.1 cubic feet per second (CFS), up to 119.37 acre-feet (AF) in diverted volume for municipal use within the Town of Stanford. The Department published receipt of the Application on its website. A deficiency letter was sent to the Applicant on January 6, 2020, and the Applicant responded March 2, 2020. Additional clarification information provided by the Applicant on April 6, 2020, reduced the requested volume to 93.9 AF. The Application was determined to be correct and complete as of May 14, 2020. An Environmental Assessment for this Application was completed on June 4, 2020.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Aerial map showing distribution system layout
- Printed and Electronic copy of Form 633
- Memo granting a variance from aquifer testing requirements of 36.12.121

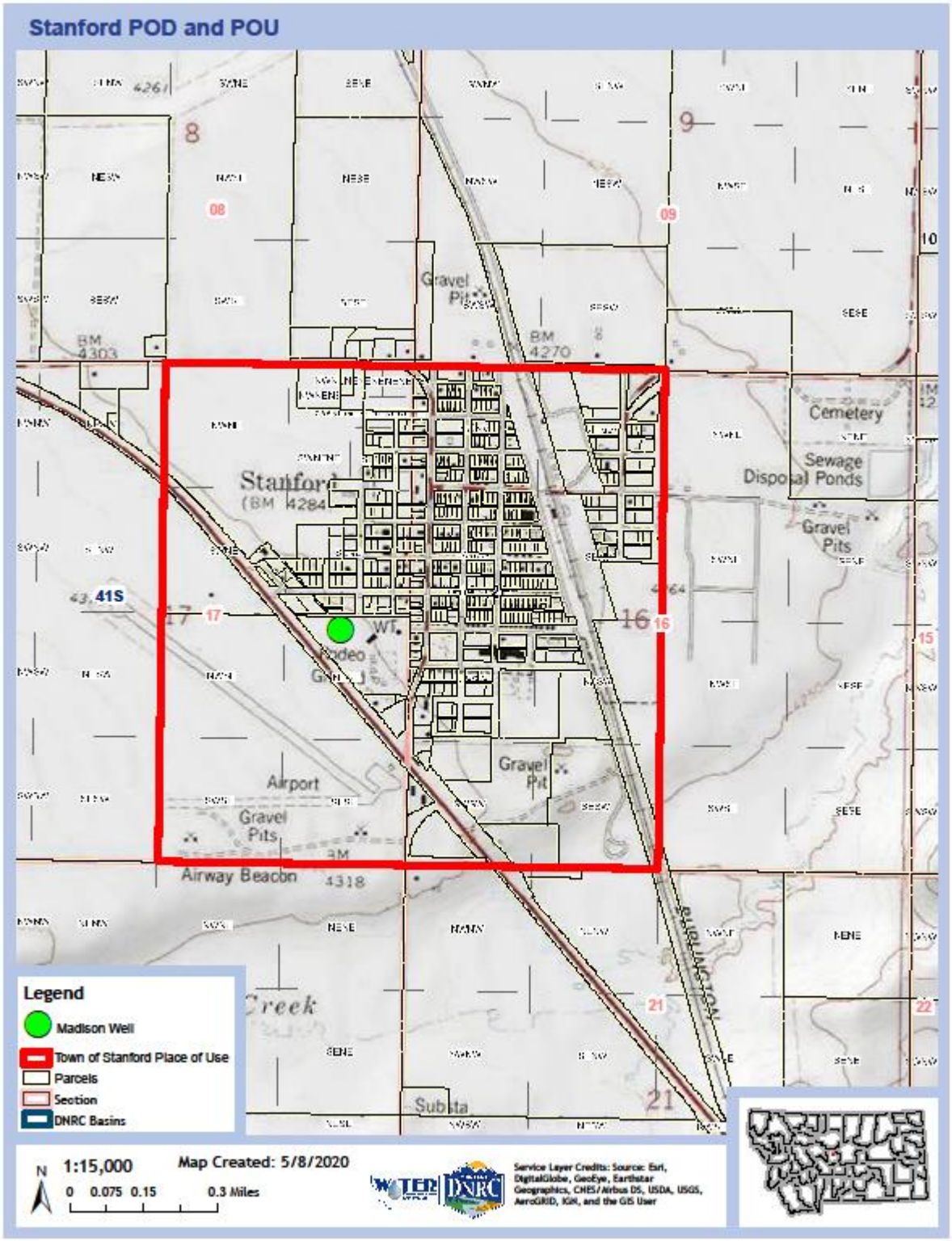
Information Received after Application Filed

- Deficiency response received March 2, 2020
- Additional information on beneficial use received March 30, 2020
- Additional explanation of beneficial use and 2002 Preliminary Engineering Report received April 6, 2020

Information within the Department's Possession/Knowledge

- Aquifer Test Report by DNRC groundwater Hydrologist Attila Folnagy, dated April 30, 2020
- Depletion Report by DNRC groundwater Hydrologist Attila Folnagy, dated April 30, 2020
- Department record of existing water rights

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).


Stanford POD and POU
Stanford
(BM 4284
Gravel Pit
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BM 4270
Cemetery
Sewage Disposal Ponds
Gravel Pits
41S
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Airport
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BM 4318
Airway Beacon
Creek
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Legend
Madison Well
Town of Stanford Place of Use
Parcels
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DNRC Basins
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Map Created: 5/8/2020
Service Layer Credits: Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from one well for municipal use. The well is completed to a depth of 3,450 feet, with a static water level of 169.5 feet below the top of the casing. The proposed point of diversion (POD) is completed in the Madison Group aquifer and is completed as an open hole for the bottom 500 feet in limestone of the Madison Group. The proposed POD is located in the NENESE Section 17, Township 16N, Range 12E, Judith Basin County. The proposed period of diversion is January 1-December 31. The proposed period of use is January 1-December 31. The place of use is generally located in the W2 Section 16 and the E2 Section 17, Township 16N, Range 12E, Judith Basin County, within the Town of Stanford.

2. The total proposed appropriation is for 1.1 CFS diverted flow up to 93.9 AF diverted volume per annum. The total consumptive use of the proposed appropriation for the purpose of analyzing surface water depletions and adverse effect is calculated to be 93.9 AF per annum, assuming 100% consumption.

3. The Applicant has 10 existing water rights for municipal use. Of these 10, two water rights are proposed to have their purpose changed to mitigation to offset depletions associated with this proposed permit. Only three water rights are associated with wells currently connected to the system (41S 1398-00, 41S 1399-00, and 41S 23674-00), which they may exercise in conjunction with this new permit to provide water throughout the service area. These wells are completed in the Colorado Aquifer. Production in these wells has dramatically decreased since they were completed due to poor well construction, biological degradation, and physical degradation. In addition, the New Tower Well #7 (41S 23674-00) has very poor water quality, and it is unlikely that the Applicant will use this well and water right unless absolutely necessary. Upon issuance of the proposed appropriation, the Applicant has projected a total annual use of 1.27 CFS (570.8 GPM) up to 125 AF per year for municipal use of water within the Town of Stanford. This projection does not include any water use from the New Tower Well #7. If

authorized, the bulk of the water (93.9 AF) will be diverted from the new Madison Aquifer well under this proposed application.

4. In order to ensure that the Applicant does not exceed the amount in which it will be able to mitigate under change Application 41S 30126463, this application will be subject to the following conditions, limitations or restrictions.

WATER USE MEASUREMENT

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA

GENERAL CONCLUSIONS OF LAW

5. The Montana Constitution expressly recognizes in relevant part that:

> (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
> (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
> (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

(1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

6. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

… the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:
(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and
(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:
(A) identification of physical water availability;
(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.
(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;
(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, "the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies." § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is "more probably than not." Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

7. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

> (1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, "uncontrolled development of a valuable natural resource" which "contradicts the spirit and purpose underlying the Water Use Act."); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

8. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

> Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

> .... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

9. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

10. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

Physical Availability

FINDINGS OF FACT

11. The Applicant is proposing to divert water from a new well for municipal use. The well is completed to a depth of 3,450 feet in the Madison Group Aquifer. The depth to the top of the Madison Group Aquifer is 2,450 feet below ground surface where the well is located. The bottom 500 feet of the well was left as an open hole. The static water level in the well is 169.5 feet below the top of the well casing.

12. The Applicant applied for and was granted a variance from the procedures outlined in ARM 36.12.121(2)(f) and 36.12.121(2)(h). The variance allowed for the Applicant to submit results for 24 hours of recovery monitoring of the pump test in lieu of the 72-hour recovery monitoring as specified on Form 633 and allowed for the Applicant to not complete a monitoring

well in the production aquifer. The aquifer test and results were deemed adequate for analysis by the Department.

13. The 72-hour single well aquifer test started on January 27, 2019, at 10:00 A.M. and continued without interruption until 10:00 A.M. on January 30, 2019, at an average flow rate of 503 GPM. The discharge was measured using a 6-inch Badger Water Meter and conveyed 200 feet from the well to a ditch that flowed away from the aquifer test site. The maximum drawdown in the pumping well was 183.07 feet below the static water level of 169.45 feet below the top of the casing (BTC).

14. An Aquifer Test Report and Depletion Report were completed by DNRC Groundwater Hydrologist Attila Folnagy on April 30, 2020. Aquifer transmissivity was derived from the Cooper-Jacob (1946) solution for the proposed well and is equal to 4,225 ft^2/day. The Cooper-Jacob (1946) solution resulted in a better type curve match versus the Theis (1935) recovery solution due to step changes in the recovery data. A reliable storativity value can only be calculated from an observation well based on the well function equation, and no observation well was used for the aquifer test. Therefore, storativity from an aquifer test that was conducted for a previous permit proceeding in central Montana for an appropriation from the Madison Group aquifer was used (Provisional Permit 41S 30065672). The storativity is equal to 0.0001.

15. Drawdown is modeled for the period of diversion for the proposed well by assigning a constant pumping rate of 58.2 GPM and drawdown from daily pumping based on aquifer testing. The well efficiency is calculated from modeling the aquifer test and dividing the predicted drawdown by that observed. Calculated well efficiency for the proposed well is equal to 53%. The actual drawdown with well loss is calculated by applying the well efficiency to the theoretical drawdown at the end of the period of diversion. The total maximum drawdown is shown in Table 1.

Table 1. Remaining available water column for proposed well.

Well Total Depth above open bottom (feet)	2,947
Pre-Test Static Water Level (feet below top of casing)	169.5
Available Drawdown above open bottom (feet)	2,777.5
Well Efficiency (%)	53
Predicted Drawdown theoretical (feet)	5.3
Predicted Drawdown including well loss (feet)	7.0
Remaining Available Water Column (feet)	2,771

16. An evaluation of physical groundwater availability was completed by calculating groundwater flux through a zone of influence (ZOI) corresponding to the 0.01-foot drawdown contour. Using the Theis (1935) solution, a constant pumping rate of 58.2 GPM for the period of diversion, T = 4,225 ft^2/day, and S = 0.0001 generated a distance-drawdown plot. The 0.01-foot drawdown contour occurs at 355,000 feet from the proposed well. The 0.01-foot drawdown contour extends past the aquifer boundaries; therefore, the radius was truncated to 19 miles (200,640 feet) which is consistent with the evaluation done for Provisional Permit 41S 30019140. The groundwater gradient for the Madison Group Aquifer is from Feltis (1980) and Cunnane (2017). The calculation for groundwater flux (Q) through the delineated area is given by the following equation and is equal to 28,413 AF/year.

$Q = TWi$

where:

T = Transmissivity = 4,225 ft^2/day

W = Width of Zone of Influence = 200,640 ft

i = Groundwater gradient (from Feltis, 1980; Cunnane, 2017) = 0.004 ft/ft.

CONCLUSIONS OF LAW

17. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that "there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate."

18. It is the applicant's burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

19. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

20. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 11-16)

Legal Availability

FINDINGS OF FACT

21. To evaluate legal availability of groundwater in the Madison Group Aquifer, a list of all rights within the 0.01-foot drawdown contour was compiled. There is only one existing water right within the 0.01-foot drawdown contour completed in the source aquifer. The existing water right is Provisional Permit 41S 30019140, and it is for a diverted volume of 484.3 AF.

22. Table 2 shows a comparison of the physical water supply and current legal demands for groundwater that could be reduced by the proposed appropriation within the Madison Group Aquifer.

Table 2. Comparison of physical water supply and existing legal demands within the Madison Group Aquifer 0.01-foot drawdown contour.

Physical Water Supply (AF/year)	Existing Legal Demands (AF/year)	Physically Available Water – Existing Legal Demands (AF/year)
28,413	484.3	27,928.7

23. In order to assess surface water legal availability for any surface water source which may be impacted by the proposed appropriation, the Department reviewed mapped geologic structures to determine where any reduction of discharge directly from the Madison Group or reduced upward seepage through the overlying strata could occur. The Department determined in its review that Arrow Creek, located to the northwest of the proposed well, is the likely surface water source that would be impacted by the proposed groundwater appropriation. Faults that trend northwest are the closest to the applicant's property and could provide a preferential pathway for drawdown to propagate from the Madison Aquifer and through the fractured overlying stratigraphy to Arrow Creek. Any reduced groundwater discharge will deplete Arrow Creek downstream of the fault intersection in Section 6, Township 18 North, Range 12 East.

24. The proposed appropriation is expected to be 100% consumptive from the aquifer, and it is expected that the consumptive impact to Arrow Creek will be equal to the average pumping rate of the appropriation, 58.2 GPM, up to 93.9 AF per year.

Table 3. Total consumption and net depletion to surface water for Town of Stanford Permit Application 41S 30126464.

Month	Consumption (AF)	Depletion (AF)	Depletion (GPM)
January	8.0	8.0	58.2
February	7.2	7.2	58.2
March	8.0	8.0	58.2
April	7.7	7.7	58.2
May	8.0	8.0	58.2
June	7.7	7.7	58.2
July	8.0	8.0	58.2

August	8.0	8.0	58.2
September	7.7	7.7	58.2
October	8.0	8.0	58.2
November	7.7	7.7	58.2
December	8.0	8.0	58.2
TOTAL	**93.9**	**93.9**	

25. A list of existing water rights on Arrow Creek from the predicted point of impact (fault) in Section 6, Township 18 North, Range 12 East, down to its confluence with the Missouri River was generated by the Department.

Table 4. Existing water rights on Arrow Creek from fault in Section 6, Township 18 North, Range 12 East, down to its confluence with the Missouri River.

WRNUMBER	PURPOSES	MEANOFDIV	ALL_OWNERS
41R 30126321	STOCK	LIVESTOCK DIRECT FROM SOURCE	M & V FARM & RANCH PARTNERSHIP
41R 160188 00	STOCK	LIVESTOCK DIRECT FROM SOURCE	SANDY ARROW RANCH LLC
41R 132054 00	STOCK	LIVESTOCK DIRECT FROM SOURCE	EVERS RANCH CO
41R 30115498	STOCK	LIVESTOCK DIRECT FROM SOURCE	26 LAND & CATTLE COMPANY LLC
41R 200743 00	STOCK	LIVESTOCK DIRECT FROM SOURCE	26 LAND & CATTLE COMPANY LLC
41R 161994 00	STOCK	LIVESTOCK DIRECT FROM SOURCE	JAN M WISHMAN
41R 158422 00	STOCK	LIVESTOCK DIRECT FROM SOURCE	CHARLES F BRONEC; JEANNE F BRONEC
41R 135923 00	STOCK	LIVESTOCK DIRECT FROM SOURCE	MONTANA, STATE BOARD OF LAND COMMISSIONERS
41R 135937 00	STOCK	LIVESTOCK DIRECT FROM SOURCE	MONTANA, STATE BOARD OF LAND COMMISSIONERS
41R 30110285	STOCK	DIRECT FROM SOURCE	MONTANA, STATE BOARD OF LAND COMMISSIONERS
41R 198163 00	STOCK	LIVESTOCK DIRECT FROM SOURCE	TURECK AG LLC
41R 135930 00	STOCK	LIVESTOCK DIRECT FROM SOURCE	MONTANA, STATE BOARD OF LAND COMMISSIONERS
41R 158862 00	STOCK	LIVESTOCK DIRECT FROM SOURCE	SANDY ARROW RANCH LLC
41R 30140390	STOCK	LIVESTOCK DIRECT FROM SOURCE	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
41R 30140875	STOCK	LIVESTOCK DIRECT FROM SOURCE	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
41R 30140870	STOCK	LIVESTOCK DIRECT FROM SOURCE	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
41R 30140387	STOCK	LIVESTOCK DIRECT FROM SOURCE	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
41R 30140391	STOCK	LIVESTOCK DIRECT FROM SOURCE	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
41R 30140873	STOCK	LIVESTOCK DIRECT FROM SOURCE	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
41R 30140389	STOCK	LIVESTOCK DIRECT FROM SOURCE	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
41R 160190 00	IRRIGATION	PUMP	SANDY ARROW RANCH LLC
41R 30140388	STOCK	LIVESTOCK DIRECT FROM SOURCE	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)

41R 30140872	STOCK	LIVESTOCK DIRECT FROM SOURCE	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
41R 30141347	STOCK	LIVESTOCK DIRECT FROM SOURCE	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
41R 30140874	STOCK	LIVESTOCK DIRECT FROM SOURCE	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
41R 30140871	STOCK	LIVESTOCK DIRECT FROM SOURCE	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
41R 135936 00	STOCK	LIVESTOCK DIRECT FROM SOURCE	MONTANA, STATE BOARD OF LAND COMMISSIONERS
41R 161996 00	IRRIGATION	PUMP	JAN M WISHMAN
41R 17751 00	IRRIGATION	PUMP	PAULA S KOSKI
41R 158821 00	STOCK	LIVESTOCK DIRECT FROM SOURCE	AMERICAN PRAIRIE FOUNDATION
41R 30064861	INSTREAM FLOW	INSTREAM	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)

26. Arrow Creek is an ungaged source and surface water flows can be unreliable throughout the year. There are year-round livestock direct-from-source rights and both irrigation and instream flow rights on Arrow Creek below the point where depletions will occur. Because of this, the Applicant is proposing to offset depletions from the proposed appropriation by retiring two existing water rights (41S 1400-00 and 41S 102000-00) as part of a mitigation plan. The two existing water rights divert water from a well completed in the Kootenai Aquifer, and as part of the mitigation plan (Change Application 41S 30126463), the Applicant provided historical use information that the two water rights were used up to 94.5 AF per year. Due to the depth and aquifer characteristics of the Kootenai aquifer, it is expected that the potentially affected reach of Arrow Creek is the same as the location identified under the proposed permit. The historical consumptive use of the water rights which will be used for mitigation is also assumed to be 100% consumptive. As such, the proposed mitigation is expected to offset depletions in Arrow Creek associated with the proposed permit and further analysis of legal availability will not be required per ARM 36.12.1704(1)(a).

CONCLUSIONS OF LAW

27. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis

involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

28. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005))(it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

29. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); see also Robert

and Marlene Takle v. DNRC *et al.*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water, *citing* Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing* Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No.* 63997-*42M by Joseph F. Crisafulli* (DNRC Final Order 1990)(since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration and cannot limit its analysis to ground water.§ 85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 ; Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

30. Where a proposed ground water appropriation depletes surface water, applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. Robert and Marlene Takle v. DNRC *et al.*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(permits granted), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007*)*(permit granted), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision,* (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion to slough and Beaverhead River); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 ("DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator"; applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping); *In the Matter of Application for Beneficial Water Use Permit No. 76D-30045578 by GBCI Other Real Estate, LLC* (DNRC Final Order 2011) (in an open basin, applicant for a new water right can show legal availability by using a mitigation/aquifer recharge

plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated; development next to Lake Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute for "historic beneficial use" in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, supra.

31. In analyzing legal availability for surface water, applicant was required to evaluate legal demands on the source of supply throughout the "area of potential impact" by the proposed use under §85-2-311(1)(a)(ii), MCA, not just within the "zone of influence." Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6.

32. Based on the Applicant's proposed mitigation plan, the Department finds the Applicant has proven by a preponderance of the evidence that surface water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested. (FOF 21-26)

Adverse Effect

FINDINGS OF FACT

33. During times of water shortage, the Applicant will make every effort to ensure the surrounding water rights are satisfied. If it is determined that the Town of Stanford has the most junior priority date, the town will implement water restrictions on its users.

34. To address potential adverse effect, Attila Folnagy, groundwater Hydrologist for the Water Management Bureau of the DNRC, modeled drawdown of the aquifer by the proposed pumping of the Applicant's well. The evaluation of drawdown in other wells was completed using the Theis (1935) solution with the following inputs: T = 4,225 ft^2/day, S= 0.0001, and a constant pumping rate of 58.2 GPM for five years. Drawdown in excess of 1 foot extends 39,000 feet from the Applicant's well. There are no water rights that are predicted to experience drawdown greater than 1 foot.

35. Depletion by pumping in the Madison Aquifer primarily occurs through propagation of drawdown through faults which may reduce flows in Arrow Creek to the northwest of Stanford.

36. The Applicant is proposing to mitigate surface water depletions on Arrow Creek by retiring Statements of Claim 41S 1400-00 and 41S 102000-00. The proposed mitigation (Change Application 41S 30126463) is expected to offset depletions in Arrow Creek associated with pumping of this proposed permit application, therefore, there will be no adverse effect to existing water users on the source.

Table 5. Difference between historical depletion associated with Change Application 41S 30126463 and new depletions from the proposed Permit Application 41S 30126464 that will accumulate in Arrow Creek.

Month	Historic Depletion (AF)	New Depletion (AF)	Difference Between Historic and New Depletions (AF)
January	8.0	8.0	0.0
February	7.2	7.2	0.0
March	8.0	8.0	0.0
April	7.7	7.7	0.0
May	8.0	8.0	0.0
June	7.7	7.7	0.0
July	8.0	8.0	0.0
August	8.0	8.0	0.0
September	7.7	7.7	0.0
October	8.0	8.0	0.0
November	7.7	7.7	0.0
December	8.0	8.0	0.0
Total	**93.9**	**93.9**	

37. The Department finds that there will not be any adverse effect to other water users as a result of the proposed permit application. Groundwater is legally available and there are no water rights with wells that are predicted to experience drawdown greater than 1 foot, and the Applicant's plan to mitigate surface water depletions on Arrow Creek will adequately offset the proposed diversion under this permit.

38. In order to ensure the Applicant does not exceed the amount of water which it can mitigate, the Applicant will be subject to the following conditions, limitations, or restrictions on its permit:

> **WATER USE MEASUREMENT**
> THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

CONCLUSIONS OF LAW

39. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

40. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(5).

41. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

42. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their "historic beneficial use." See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

43. It is the applicant's burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

44. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

45. The Department can and routinely does, condition a new permit's use on use of that special management, technology or measurement such as augmentation now generally known as mitigation and aquifer recharge. See § 85-2-312; § 85-2-360 et seq., MCA; see, e.g., *In the Matter of Beneficial Water Use Permit No. 107-41I by Diehl Development* (DNRC Final Order 1974) (No adverse effect if permit conditions to allow specific flow past point of diversion.); *In the Matter of Combined Application for Beneficial Water Use Permit No. 76H- 30043133 and Application No. 76H-30043132 to Change Water Right Nos. 76H-121640-00, 76H-131641-00 and 76H-131642-00 by the Town of Stevensville* (DNRC Final Order 2011).

A plan to prove legal availability and prevent adverse effect can be to use mitigation or augmentation. § 85-2-360, MCA; e.g., *In the Matter of Beneficial Water Use Permit Application Nos. 41H 30012025 and 41H 30013629 by Utility Solutions, LLC*, (DNRC Final Order 2006)(

permit conditioned to mitigate/augment depletions to the Gallatin River by use of infiltration galleries in the amount of .55 cfs and 124 AF), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Beneficial Water Use Permit Application Nos. 41H 30019215 by Utility Solutions, LLC*, (DNRC Final Order 2007)(permit conditioned to mitigate 6 gpm up to 9.73 AF of potential depletion to the Gallatin River), affirmed, Montana River Action Network v. DNRC, Cause No. CDV-2007-602, Montana First Judicial District Court, (2008); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 12; *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC* (DNRC 2008)(permit conditioned on mitigation of 3.2 gpm up to 5.18 AF of depletion to the Gallatin River); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (HB 831, DNRC Final Order 2009) (permit denied in part for failure to analyze legal availability for surface water for depletion of 1.31 AF to Bitterroot River)§ 85-2-360, MCA. The Department has a history of approving new appropriations where applicant will mitigate/augment to offset depletions caused by the new appropriation. *In the Matter of Beneficial Water Use Permit Application No. 41I-104667 by Woods and Application to Change Water Right No 41I-G(W) 125497 by Ronald J. Woods*, (DNRC Final Order 2000); *In The Matter of Application To Change Appropriation Water Right 76GJ 110821 by Peterson and MT Department of Transportation*, DNRC Final Order (2001); *In The Matter of Application To Change Appropriation Water Right No. 76G-3235699 by Arco Environmental Remediation LLC*.(DNRC Final Order 2003) (allows water under claim 76G-32356 to be exchanged for water appropriated out of priority by permits at the wet closures and wildlife to offset consumption). *In The Matter of Designation of the Larsen Creek Controlled Groundwater Area as Permanent, Board of Natural Resources Final Order* (1988).

Montana case law also provides a history of mitigation, including mitigation by new or untried methods. See Thompson v. Harvey (1974),154 Mont. 133, 519 P.2d 963; Perkins v. Kramer (1966), 148 Mont. 355, 423 P.2d 587. Augmentation/ mitigation is also recognized in other pri*or*

*appro*priation states for various purposes. E.g. C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho).

The requirement for mitigation in closed basins has been codified in § 85-2-360, *et seq.*, MCA. Section 85-2-360(5), MCA provides in relevant part:

> A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be made by the d*epartment based on the amount*, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that may be adversely affected.
>
> (Emphasis added.)

46. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF 33-38)

Adequate Diversion

FINDINGS OF FACT

47. The Applicant proposes to divert 1.1 CFS up to 93.9 AF per year from a well located in the NENESE Section 17, Township 16N, Range 12E, Judith Basin County. The well construction was approved by Montana DEQ and was drilled by Dallas Werner, a licensed well driller in the State of Montana (License No. WWC-742). The well is completed in the Madison Group Aquifer to a depth of 3,450 feet. The well pump is a 75-horsepower pump set in 480 feet of 6" drop pipe. Water from the well will be conveyed to the Chlorine Building via an 8" PVC pipe. From the Chlorine Building, water can either be distributed directly to the town or to the 317,000-gallon storage tank. Operation of the diversion will be controlled by a SCADA system.

CONCLUSIONS OF LAW

48. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

49. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably

effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

50. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA. (FOF 47)

Beneficial Use

FINDINGS OF FACT

51. The Applicant is proposing to divert 1.1 CFS flow up to 93.9 AF per year for municipal use within the Town of Stanford. Municipal use is identified as a beneficial use of water in § 85-2-102(4)(a), MCA. The requested period of diversion and period of use is January 1-December 31.

52. A flow rate of 1.1 CFS is being requested so that the Town of Stanford has the ability to fill the storage tank considerably faster than current rates, which will also allow a decrease in pump run time which is expected to preserve the lifespan of the pump and related equipment. A flow rate of 1.1 CFS will also provide the town with a better ability to ensure fire protection appropriations can be sustained.

53. Existing diversions for the Town of Stanford are estimated to be 114.2 AF per year. This was calculated based on current operation of the system with the Railroad Well #5 (Statement of Claim 41S 1398-00) and Well #9 (Statement of Claim 41S 1399-00) constantly diverting at their current capacity for 24 hours a day, 365 days a year at a combined flow rate of 70.8 GPM. The town currently implements restrictions due to inadequate physical supply of water.

54. In order to estimate water needs for the Town of Stanford, the Applicant applied the following methodology. First, it used the average daily demand (gallons per capita per day) of 211 gallons as calculated in the 2002 Preliminary Engineering Report. Then, it multiplied that amount by the number of residents (423) in the town as of 2016. Finally, in order to account for system loss due to leaky pipes and fixtures, the Applicant applied a U.S. EPA maximum

allowable loss for small water systems of 25%. This is justified by the fact that in the 2002 PER, an average system loss of 25 GPM was determined. The total demand using this methodology is 125 AF, which equals a constant diversion rate of 77.5 GPM.

211 gpcd x 423 residents x 365 days x 1.25 (25% loss factor) = 40,721,681 gallons = 125 AF

55. Total demand was then broken down to determine the volume required under this proposed permit based on system operation. The Railroad Well #5 pump runs constantly at 17 GPM to provide a chlorine boost to the east side of the system. This operation will continue, and as such the well will produce a volume of 27.4 AF per year. This would leave a need for a constant diversion rate of 60.5 GPM from the new Madison Group Well and Well #9. Well #9 produces an average yield of 53.8 GPM and would have to be constantly pumped in order to try to keep up with demand. The well is currently being operated in this fashion in an attempt to provide for the water demands, but it is inefficient and hard on the system. With the new Madison Group Well in service, Well #9 will serve as a supplemental water source and operate for one hour per day, which will decrease power costs and keep the system from being over-stressed. At an operation of one hour per day Well #9 will produce a total volume of 3.6 AF per year.

56. Factoring in well operation for Railroad Well #5 and Well #9, this leaves an annual volume requirement of 93.9 AF (125 AF-27.4 AF-3.6 AF) from the Madison Group Well. This volume would equate to an average operating duration of 2.8 hours per day.

57. As previously mentioned, the New Tower Well #7 has low yield and poor water quality and is only brought online in emergencies or to flush the well out, and therefore the Applicant did not consider it an active well for their demand calculations.

CONCLUSIONS OF LAW

58. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.

59. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC *et al*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

60. Applicant proposes to use water for municipal use which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by preponderance of the evidence municipal use is a beneficial uss and that 93.9 AF of diverted volume and 1.1 CFS flow of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 51-57)

Possessory Interest

FINDINGS OF FACT

61. This application is for a municipal use application in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. The Applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

CONCLUSIONS OF LAW

62. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

63. Pursuant to ARM 36.12.1802:

> (1) An applicant or a representative shall sign the application affidavit to affirm the following:
> (a) the statements on the application and all information submitted with the application are true and correct and
> (b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.
> (2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.
> (3) The department may require a copy of the written consent of the person having the possessory interest.

64. The Applicants have proven by a preponderance of the evidence that they have a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 61)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 41S 30126464 should be GRANTED.

The Department determines the Applicant may divert groundwater by means of a well in the NENESE Section 17, Township 16N, Range 12E, Judith Basin County, from January 1-December 31 at 1.1 CFS up to 93.9 AF, for municipal use from January 1-December 31. The place of use is generally located in the W2 Section 16 and the E2 Section 17, Township 16N, Range 12E, Judith Basin County, within the Town of Stanford.

The application will be subject to the following conditions, limitations or restrictions.

WATER USE MEASUREMENT

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

SUBMIT RECORDS TO:
LEWISTOWN WATER RESOURCES REGIONAL OFFICE
613 NE MAIN ST, SUITE E
LEWISTOWN, MT 59457
PH: (406)538-7459

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 11th day of June 2020

_____

Scott Irvin, Regional Manager
Lewistown Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 11th day of June 2020, by first class United States mail.

TOWN OF STANFORD
PO BOX 123
STANFORD, MT 59476

ROBERT PECCIA AND ASSOCIATES
%KAELA MURPHY
PO BOX 5653
HELENA, MT 59601

_____ _____

NAME DATE